FILE COPY

APR

IN THE

Supreme Court of the United States

October Term, 1958.

No. 887

CHARLES H. RUTHERFORD,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MURRAY M. CHASE,
RUSSELL E. PARSONS,
202 South Hamilton Drive,
Beverly Hills, California,
Attorneys for Petitioner.

Jim Myers Legal Press, Los Angeles, Phone MA 5-0525

SUBJECT INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	3
Jurisdiction of United States District Court	3
Statutes and constitutional provisions involved	3
Statement of the case	5
Statement of facts	7
Argument	9
I.	
The trial court should have granted the motion to suppress evidence	9
II.	
The evidence was not sufficient to establish the guilt of the petitioner	15
III.	
The Government failed to establish the necessary venue	18
Conclusion	19
Appendix:	
Exhibit A. First Opinion of Circuit Court	App. p. 1
Exhibit B. Second Opinion of Circuit Court	App. p. 12
Exhibit C. Difference Between First and Second Opinions of Circuit Court	App. p. 25

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Brinegar v. United States, 338 U. S. 160, 93 L. Ed. 1879	11, 12
Clay v. United States, 239 F. 2d 196	16
Giles v. United States, 284 Fed. 208	10
Giordenello v. United States, 78 S. Ct. 1245	9
Grau v. United States, 287 U. S. 124	11
Kohler v. United States, 9 F. 2d 23	11
Lewellyn v. Pittsburgh B. & L. E. R. Co., 222 Fed. 177	18
Lockname v. United States, 2 F. 2d 427	11
People v. Coppla, 100 Cal. App. 2d 766, 224 P. 2d 828	17
People v. Griego, 136 Cal. App. 2d 51, 288 P. 2d 175	17
Ripper v. United States, 178 Fed. 24	10
Schencks v. United States, 2 F. 2d 185	10
Stacey v. Emery, 97 U. S. 642, 24 L. Ed. 1035	9
Supreme Malt Products Co. v. United States, 153 F. 2d 5	18
United States v. Calamaro, 354 U. S. 351	16, 17
United States v. Lassoff, 147 Fed. Supp. 944	10, 14
Veeder v. United States, 252 Fed. 414	10
Wagner v. United States, 8 F. 2d 581	10

STATUTES

United States Code, Title 18, Sec. 3231	3
United States Code, Title 26, Sec. 4401c	4, 6, 17, 18
United States Code, Title 26, Sec. 4411	4, 6
United States Code, Title 26, Sec. 4412	4, 6
United States Code, Title 26, Sec. 7203	1, 2, 3, 6
United States Code, Title 28, Sec. 1254(1)	2
United States Constitution, Fourth Amendment	5

IN THE

Supreme Court of the United States

October Term, 1958.

No. .....

CHARLES H. RUTHERFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Charles H. Rutherford, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 28, 1959, whereby the judgment of conviction made by the United States District Court adjudging the petitioner guilty of violating Title 26, United States Code, Section 7203 (willful failure to register and to pay occupational tax), and from the order denying petitioner's motion for a new trial were affirmed; Petition for Rehearing was denied March 17, 1959 [Tr. of Rec. p. 63].

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of conviction, and the order denying petitioner's motion for a new trial by the United States District Court, whereby

the petitioner was adjudged guilty of violating, Title 26, United States Code, Section 7203 (willful failure to register and to pay occupational tax), is set forth as "Exhibit A". (The decision is not yet reported). A Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit was denied on March 17, 1959, and a modified opinion of the United States Court of Appeals for the Ninth Circuit is set forth as "Exhibit B." The amended opinion is not yet reported.

That the original opinion set forth as "Exhibit A" was modified by the subsequent opinion set forth as "Exhibit B" by the amendment set forth as "Exhibit C".

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered January 28, 1959. The Petition for Rehearing was denied by said Court on March 17, 1959.

The issues presented here were urged in the lower Court.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

The Circuit Court has rendered a decision in conflict with the decisions of the Supreme Court and of other Courts of Appeal, as set forth in this Petition; and important questions of law raised in this Petition should be settled by this Court.

Questions Presented.

I. Should the Trial Court have granted the motion to suppress evidence?

II. Was the evidence sufficient to establish the guilt of the petitioner?

III. Did the Government fail to establish venue by failing to show that the petitioner engaged in the business of accepting and receiving wagers within the jurisdiction of the Court?

Jurisdiction of United States District Court.

The jurisdiction of the United States District Court was invoked under Title 18, United States Code, Section 3231.

Statutes and Constitutional Provisions Involved.

Title 26, United States Code, Section 7203, provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Title 26, United States Code, Section 4401(c), provides:

"Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him."

Title 26, United States Code, Section 4411, provides:

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

Title 26, United States Code, Section 4412, provides:

"(a) Requirement—

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.".

United States Constitution, Fourth Amendment, provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case.

Respondent filed an Information in the United States District Court, Southern District of California, Central Division, No. 26177-Crim. CD, against Charles H. Rutherford, the petitioner, charging that during the period beginning July 1, 1957 and up to and including August 15, 1957, the petitioner, Charles H. Rutherford, engaged in the business of accepting wagers with re-

spect to horse races and received wagers with respect to horse races within the meaning of Title 26, United States Code, Section 4401(c), and that by reason thereof he was required by law to register and pay the occupational tax (wagering) as required by Sections 4411 and 4412 of the Internal Revenue Code, 1954, and that he did wilfully and knowingly fail to register and to pay said tax in violation of Title 26, United States Code, Section 7203 [Tr. of Rec. pp. 3-4].

That petitioner filed a Motion for Bill of Particulars [Tr. of Rec. pp. 4-7], and an order was made granting a Bill of Particulars [Tr. of Rec. pp. 8-9]; that the Bill of Particulars was furnished by the respondent [Tr. of Rec. pp. 9-18].

That petitioner filed a Motion for Return of Personal Property and to Suppress Evidence [Tr. of Rec. pp. 18-22], which was denied by the Court [Tr. of Rec. p. 34].

That the petitioner, together with co-defendants Howard Cupp and Monica Kissel, proceeded to trial by the Court without a jury; that the charges (failing to pay a wagering occupational tax) against co-defendant Monica Kissell were dismissed on motion of the United States Attorney [Tr. of Rec. p. 44]; and co-defendant Howard Cupp was adjudged not guilty [Tr. of Rec. pp. 43-44], and the petitioner was adjudged guilty [Tr. of Rec. p. 37].

Petitioner's motion for a new trial [Tr. of Rec. pp. 35-36] was denied by the Court [Tr. of Rec. p. 37] and it was adjudged that the petitioner pay a fine in the sum of $2,500.00 [Tr. of Rec. p. 38].

An appeal was taken by petitioner to the United States Court of Appeals for the Ninth Circuit. The

Circuit Court affirmed the judgment of conviction and the order denying a motion for a new trial made by the District Court. Petitioner's Petition for Rehearing was denied by the Circuit Court [Tr. of Rec. pp. 62-63].

The Circuit Court made an order staying the issuance of the mandate pending the filing, consideration and disposition by the Supreme Court of the United States of a Petition for Writ of Certiorari to be made by the petitioner, provided said Petition is filed on or before April 16, 1959; and in the event the Petition for Writ of Certiorari is granted, the stay is to continue, pending the final disposition of the case by the Supreme Court of the United States.

Statement of Facts.

Petitioner did not register or pay a wagering occupational tax required of one engaged in the business of accepting and receiving wagers with respect to horse races.

On several occasions between July 25, 1957 and August 15, 1957, the petitioner was seen by Federal agents and Los Angeles County deputy sheriffs driving into an auto park adjoining Mark's Restaurant in Compton at approximately 6:00 P. M. On these occasions he would meet Howard Cupp, who approached the petitioner's automobile and handed him a rolled up package of papers.

On some occasions Monica Kissell met Howard Cupp at the place designated and received from him a rolled up package of papers.

On one occasion an unidentified woman met the petitioner at the place designated and handed him a package of rolled up papers.

On August 15, 1957 at approximately 6:00 to 6:15 P. M. the petitioner was seen by a deputy sheriff at

the same auto park meeting Cupp and a package passing from Cupp to the petitioner; shortly thereafter Federal Agent Katayama knocked on the door of Apartment F, 110 North Burris, Compton, California, and said, "Open up. We are federal officers and have a search warrant." After waiting 20 to 25 seconds and receiving no response, the federal agent in the company of deputy sheriffs broke the door down and entered the apartment. He saw the petitioner seated on a couch stuffing some papers underneath the seat, and there was a brown paper bag containing a number of papers at his feet. A copy of the search warrant was given to the petitioner approximately twenty minutes before leaving the premises.

It was stipulated that Deputy Sheriff Carl Seltzer would testify that pieces of paper in the brown paper bag and under the cushion of the couch contained notations of purported bets on horse races and figures showing the totalization of wins and losses on the said purported bets.

All of these papers were seized by the federal agent at the said apartment.

Federal Agents Ness and Katayama held a conversation with the petitioner at the said apartment on August 15, 1957 in which they asked him what the papers were and the petitioner replied that they were betting markers that he picked up from a clerk of Swede's at the Mark's Restaurant auto park. The petitioner was asked what he was doing with them, and he replied that he was just figuring the wins and losses and that Swede would come around about 10:00 o'clock each night and pick them up. The petitioner stated he was getting $150.00 a week for his services. When asked if he knew he was required to have a wagering stamp, he said he did not need a stamp because he was not a bookmaker [Tr. of Rec. pp. 43-45].

ARGUMENT.

I.

The Trial Court Should Have Granted the Motion to Suppress Evidence.

No search warrant shall issue except upon probable cause supported by oath or affirmation.

United States Constitution, Fourth Amendment.

In the case of *Giordenello v. United States*, 78 S. Ct. 1245, the Court held in a prosecution for violating the Narcotic Law that an arrest warrant was improperly issued and the seized narcotics should not have been admitted into evidence; and that petitioner's conviction must be set aside. The judgment of the Court of Appeals affirming the conviction by the District Court was reversed.

In the *Giordenello* case the petitioner moved to suppress for use as evidence the narcotics seized from his person. The motion was denied by the District Court. The Supreme Court held that the Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

Probable cause means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.

Stacey v. Emery, 97 U. S. 642, 24 L. Ed. 1035.

Where an affidavit in support of the issuance of a search warrant does not set out facts showing the re-

quired probable cause, the motion to suppress evidence seized as a result of the search warrant must be granted.

United States v. Lassoff, 147 Fed. Supp. 944.

The affidavit for the search warrant must state facts known to be true from observation. Courts should not validate writs issued on sworn declaration which literally comply with the terms of the Federal Statute on information and belief or conclusions, instead of positively alleging the material facts.

Ripper v. United States, 178 Fed. 24, 26 (8th Cir.);

Schencks v. United States, 2 F. 2d 185, 186, 187.

The evidence before the Judge or Commissioner who issues the search warrant must be such as would be admissible on trial.

Wagner v. United States, 8 F. 2d 581, 583 (8th Cir.);

Giles v. United States, 284 Fed. 208, 214 (1st Cir.).

The Commissioner must be furnished with facts—not observations, beliefs or surmises.

Veeder v. United States, 252 Fed. 414, 418 (7th Cir.).

When the validity of a warrant was before the Court of Appeals for the First Circuit in *Giles v. United States*, 284 Fed. 208, the Court said that the affidavit should have affirmatively appeared that the affiant had personal knowledge of facts competent for a jury to consider.

and the facts, and not his conclusion from the facts, should have been before the Commissioner.

Lockname v. United States, 2 F. 2d 427, 428 (9th Cir.);

Kohler v. United States, 9 F. 2d 23, 25 (9th Cir.).

A search warrant could issue only upon evidence which could be competent in a trial before a jury and of such a nature to lead a man of prudence and caution to believe that the offense had been committed.

Grau v. United States, 287 U. S. 124, 128.

Sworn general statements set forth in the affidavit are not sufficient to warrant a judicial finding of probable cause for the issuance of a search warrant, and therefore the warrant is void.

United States v. Lassoff, 147 Fed. Supp. 944, 949.

The Circuit Court, in commenting on the authorities cited by petitioner in support of his contention that the search warrant was improperly issued and the motion to suppress evidence should have been granted, cites the case of *Brinegar v. United States*, 338 U. S. 160, 93 L. Ed. 1879, on page 8 of the Circuit Court's opinion —Appendix pp. 9, 21.

The Circuit Court states that the *Brinegar* case explains or disapproves former cases relied upon by petitioner.

However, with all due deference to the Circuit Court, it must be pointed out that there is no conflict between the law of the *Brinegar* case and the authorities cited by petitioner.

The facts make the decisions; and the facts in the *Brinegar* case show unmistakably that the officers had a right to make the arrest and make the search as incidental to the arrest.

The facts in the *Brinegar* case were:

1. The officers had previously arrested the defendant five months before.

2. They had seen him transporting liquor on two previous occasions.

3. The automobile was heavily loaded.

4. When the officers took out after the defendant he picked up speed.

5. One case of liquor was visible on the seat of the defendant's automobile from the outside.

6. The defendant admitted having twelve cases of liquor.

7. The automobile was searched after all of the foregoing events.

These facts were noted on pages 162-163 of the *Brinegar* case.

The Court in the *Brinegar* case held that the knowledge of the officers that the defendant was engaged in an unlawful business was not based wholly or largely on surmise and hearsay. The facts were derived from personal observation and were sufficient. (P. 172 of the *Brinegar* case.)

In short, the guilt of the defendant in the *Brinegar* case was clear before a search was made.

The facts in the instant case, on the other hand, show that the search warrant was issued on the basis

of surmise and hearsay, without personal knowledge that the petitioner was engaging in an unlawful business. Instances of this surmise, hearsay and remoteness are:

1. Deputy Sheriff Fowler observed and heard one of his confidential informants dial a certain telephone number and place a bet on a horse race; the address of the place to which was assigned the number dialed by the informant was one where Howard Lee Cupp was observed leaving. (This address was not connected in any way with the petitioner.)

2. Deputy Sheriff Fowler cited the records of the Los Angeles County Sheriff's Office pertaining to previous convictions of the petitioner. These were gambling in 1938, 1949 and 1955; and bookmaking in 1946 and another occasion, the date not being given.

3. Deputy Sheriff Fowler stated that the petitioner has a reputation as a bookmaker.

4. Deputy Sheriff Fowler stated the petitioner is the son of Mark Rutherford, a known notorious bookmaker, and the petitioner has taken over his father's business.

5. Deputy Sheriff Bublitz stated that the petitioner is a notorious bookmaker.

6. Deputy Sheriff Bublitz stated that Monica Kissell has the reputation as a girl-friend of the petitioner.

7. Deputy Sheriff Bublitz stated that Rutherford's *modus operandi* consists of operating a "relay-back office" operation in which the bettor never has contact with the actual bookie.

8. Deputy Sheriff Bublitz stated that Earl Maltby said that he was accepting wagers on behalf of a person known to him only as "C. H.".

9. Agent Katayama stated he was advised the petitioner was conducting large-scale bookmaking activities. [Tr. of Rec. pp. 26-33.]

These affidavits in support of the search warrant demonstrate that the material does not comply with the judicial rulings on this subject.

In the instant case the search warrant was issued by United States Commissioner Theodore Hocke, based on the affidavit of Special Agent Arthur S. Katayama [Tr. of Rec. pp. 22-23], who incorporated by reference affidavits of Los Angeles County Deputy Sheriffs Howard Fowler and Calvin A. Bublitz [Tr. of Rec. pp. 25-29, 31-33], and an additional affidavit of the said Arthur S. Katayama [Tr. of Rec. pp. 29-31].

It should be noted that the Affidavit of Special Agent Katayama states a conclusion rather than ultimate facts when he states: "that he has reason to believe . . . there is now being concealed certain property, namely, betting markers. . . ." etc. [Tr. of Rec. p. 25].

The affidavits of Deputy Sheriffs Howard Fowler and Calvin A. Bublitz are replete with hearsay, conclusions, as well as information and belief. A reading of the affidavits [Tr. of Rec. pp. 26-29, 31-33] demonstrates beyond question that the material set forth in the affidavits does not comply with the judicial rulings hereinabove cited to the Court.

The additional affidavit of Special Agent Katayama [Tr. of Rec. pp. 29-31] is based on conclusions when the affiant states that the slips of paper handed to Rutherford by Cupp are betting markers, since at no time was there any showing that the affiant ever identified the pieces of paper as having passed from Cupp to Rutherford, or saw them so as to state what was contained on them.

II.

The Evidence Was Not Sufficient to Establish the Guilt of the Petitioner.

The Circuit Court, in its Opinion, Appendix, Exhibit B, page 21, states, "There was before the Court a great mass of evidence of repeated transactions of appellant personally receiving from one or more persons at the North Burris apartment in Compton." It is respectfully submitted that there is no evidence in the record to warrant such a conclusion. There was no evidence of petitioner receiving any transactions from anyone at the North Burris apartment.

The Circuit Court in its Opinion, Appendix, Exhibit B, page 22, states, "Eye witnesses saw him (petitioner) receive from runners or pick-up men sheets of paper of the kind used by bookmakers, and observed that immediately thereafter appellant went to the very same apartment address where he was arrested and where the bookmaking material was seized under the search warrant."

Petitioner strongly contends that the record is silent that the persons who gave "rolled up packages of paper" were "runners or pick-up men." The record also does not disclose an identification of the "rolled up packages of paper" handed to the petitioner at the auto park, and therefore the conclusion reached by the Circuit Court that they were of the kind used by bookmakers is not warranted by the evidence.

Other than the occasion on August 15, 1957, when the petitioner left the auto park and went to the apartment on North Burris in Compton, the record is silent in the case in chief that the petitioner on each occasion after picking up papers at the auto park went to the

apartment, and when the Court stated in its Opinion that such was the situation it went counter to the evidence in the record. Perhaps the Court is referring to the affidavits in support of the search warrant which were received in connection with the motion to suppress evidence, wherein it was stated that the petitioner was followed to the North Burris Avenue apartment and that the Cadillac used by petitioner was found parked at that address.

Mere intra-state transportation of gambling material does not establish a crime.

Clay v. United States, 239 F. 2d 196, 199 (5th Cir.).

Congress did not choose to subject all employees of gambling enterprises to the tax and reporting requirements, but was content to impose them on persons actually "engaged in receiving wagers." The occupational tax does not apply to a pick-up man.

United States v. Calamaro, 354 U. S. 351, 357.

The pick-up man no more receives a wager than a messenger who carries records of customers' transactions from a branch bank to a central office receives deposits. It is the writer and not the pick-up man who is "engaged in receiving wagers."

United States v. Calamaro, 354 U. S. 351, 355.

In the instant case all the evidence shows is that the petitioner did not register or pay a wagering occupational tax [Tr. of Rec. p. 43]; and that he was seen on several occasions to receive papers in an auto park [Tr. of Rec. pp. 43-44]; and that papers identified as containing purported bets on horse races were seized by a Federal agent at an appartment where the petitioner was arrested [Tr. of Rec. pp. 44-45].

However, when the petitioner was asked what he was doing with the papers he replied that he was just figuring the wins and losses, and that he did not need a stamp because he was not a bookmaker [Tr. of Rec. p. 45].

Where the prosecution presents as part of its case defendant's statement, the State was bound by that evidence in absence of proof to the contrary.

People v. Coppla, 100 Cal. App. 2d 766, 769, 224 P. 2d 828;

People v. Griego, 136 Cal. App. 2d 51, 56, 288 P. 2d 175.

Giving the Government the full benefit of the evidence submitted, it is respectfully urged that the evidence shows that the petitioner picked up pieces of paper, was found in possession of purported bets on horse races, and stated that he had figured the wins and losses for someone else.

The evidence does not show that the petitioner wilfully and knowingly failed to register and to pay the tax "well knowing" that he was required to do so. The evidence does not show that the defendant "engaged in receiving wagers" within the meaning of the *Calamaro* case.

Since the Government introduced evidence of a conversation held with the petitioner, it is bound by that conversation in the absence of proof to the contrary.

Title 26, United States Code, Section 4401(c), provides:

> ". . . each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax . . . on all wagers placed with him . . ."

The Government failed to establish that the petitioner "engaged in business" within the meaning of Section 4401(c) of Title 26, United States Code.

"Engaged in business" means conducting, prosecuting and continuing business by performing progressively all the acts normally incident thereto.

Supreme Malt Products Co. v. United States, 153 F. 2d 5, 6;

Llewellyn v. Pittsburgh B. & L. E. R. Co., 222 Fed. 177, 185-186.

In the absence of evidence that the petitioner had knowledge that he was required to register and pay the wagering occupational tax (the Information charges "well knowing these facts") [Tr. of Rec. p. 3], the evidence is insufficient to show a wilful and knowing violation of the law.

It is particularly significant that the record is silent that the petitioner or anyone else accepted the wagers or any of the wagers set forth in the Bill of Particulars.

III.

The Government Failed to Establish the Necessary Venue.

The Information was filed in the United States District Court, Southern District of California, Central Division [Tr. of Rec. p. 3].

The Information charged that the registration and payment of tax was required to be made to the District Director of Internal Revenue at Los Angeles, California, within the Central Division of the Southern District of California [Tr. of Rec. p. 3].

The Government failed to produce evidence to show that the pettioner engaged in the business of accepting wagers within the Central Division of the Southern District of California. The evidence merely showed that he was arrested in the area affected, and that papers containing purported bets were found in the apartment with the petitioner where he was arrested. However, the evidence does not show that the purported wagers were received within the venue of the Court, nor does the evidence show that petitioner engaged in the business of accepting wagers within the venue of the Court.

Conclusion.

It is respectfully submitted, that a Writ of Certiorari should issue to the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the Circuit Court, as the decision of the Circuit Court is in direct conflict with the decisions of the Supreme Court and other Courts of Appeals as set forth in this Petition; the Writ should also issue, as important questions of law raised in this Petition should be settled by this Court.

Respectfully submitted.

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,
By MURRAY M. CHOTINER,
Attorneys for Petitioner.

EXHIBIT "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Charles H. Rutherford, Appellant, vs. United States of America, Appellee. No. 15,855.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers and Hamley, Circuit Judges, and Bowen, District Judge.

Bowen, District Judge:

This is an appeal by appellant from his conviction and $2,500 fine imposed by the United States District Court for the Southern District of California, Central Division, for his willful failure to register and pay a horse race wagering occupational tax as required by Sections 4411 and 4412, Internal Revenue Code, 1954, and in violation of Section 7203, Title 26, U. S. Code. The case was tried by the Court without a jury upon an Information filed by the United States Attorney, charging in substance

That during the tax year beginning July 1, 1957 and up to and including August 15, 1957, appellant engaged in the business of accepting wagers on horse races and received such wagers within the meaning of Section 4401c, U. S. Code, and that because of such activity appellant was required by Sections 4411 and 4412, Internal Revenue Code, 1954 to register and pay the wagering occupational tax to the Internal Revenue District Director at Los Angeles within the Central Division of the Southern District of California and that the appellant, well knowing those facts, did willfully and knowingly fail to register and pay such District Director, or any other

proper officer of the United States, in violation of Section 7203, Title 26, U.S.C.

The principal contentions of appellant are (1) that the evidence stated in the supporting affidavits was insufficient to show probable cause for issuing the search warrant used to obtain certain seized papers which were later admitted at the trial to prove the charges of the Information against the appellant, and that the motion to suppress that evidence should have been granted, (2) that the evidence was insufficient to support the conviction and sentence of appellant, and (3) that the evidence did not sufficiently establish venue in the Trial Court, where in appropriate proceedings all these contentions were timely raised by appellant, but in each instance the Trial Court ruled adversely to appellant.

Of two other defendants tried with appellant but charged in a separate related case one was dismissed upon Appellee's motion and the other was adjudged not guilty.

On the occasion of the search and seizure of the papers, appellant was seen sitting on a couch stuffing some papers under the seat and a brown paper bag containing a number of papers was on the floor near his feet. By stipulation it was admitted that Deputy Sheriff Seltzer would testify that pieces of paper in the paper bag and those stuffed under the couch cushions contained notations of purported bets on horse races and figures showing totals of wins and losses on those bets.

In conversation with federal agents at that time, appellant said those papers were betting markers received by him from a clerk of Swede's (not otherwise identified by appellant) at the auto park identified in the evidence as a meeting place where appellant was said to have previously received rolls of papers from other named persons. Ap-

pellant also then said that he was using those papers to figure wins and losses; that Swede would pick them up nightly about 10 o'clock, that he was getting $150 weekly for his services, and when asked if he knew he was required to have a wagering (tax) stamp he said he did not need one because he was not a bookmaker.

As to appellant's contention (1), at the Trial Court hearing on appellant's motion to suppress the evidence for alleged lack of probable cause for issuing the search warrant, four supporting affidavits were brought into question.

The so-called affidavit for search warrant was made by Federal Special Agent Katayama stating that he "* * * has reason to believe that on the premises known as apartment F, 110 North Burris Road, Compton, California, in the Southern District of California, there is now being concealed certain property, namely betting markers, 'owe sheets,' 'scratch sheets, money, telephones, pencils, record paper, and other equipment and bookmaking paraphernalia, which are being used in violating the Internal Revenue laws pertaining to wagering, Sections 4401, 4411 and 4412, Internal Revenue Code 1954. And that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: The affidavits attached hereto are incorporated by reference herein. * * *"

So attached were three more affidavits,—one each by Deputy Sheriffs Howard Fowler and Calvin Bublitz and an additional one by Katayama.

Fowler's affidavit so attached stated in substance and effect, among other things, that on August 1, 1957, he observed and heard one of his confidential informants dial a certain telephone number and place a bet on a horse race. Fowler then located the address of the place

to which was assigned the number dialed by the informant and observed Howard Lee Cupp, who was acquitted as one of the defendants in the related case tried with this one, leave that place address, and drive to an auto park adjoining Mark's Restaurant at the corner of Long Beach Boulevard and Myrrh Street, Compton, California, and after Cupp waited there about five minutes, the appellant drove to that street corner address in a 1957 Cadillac license number MLR 406, and then Cupp passed to appellant a parcel containing white slips of paper and thereupon appellant drove away and while under constant surveillance was trailed to Apartment F, 110 North Burris Avenue, Compton, California, and into that location appellant was observed to carry said parcel of papers;

That on July 26 and 30, and August 5, 1957, Cupp arrived at the same Long Beach Boulevard and Myrrh Street address and passed similar parcels of paper to appellant; that on two of these occasions appellant used a Ford car and on the other occasion he used said Cadillac car; that on each of those occasions appellant after so receiving the papers proceeded to the North Burris Road location in Compton; that on July 27, 1957 Cupp was met at that address by a woman known to affiant as the friend of appellant and who was driving said 1957 Cadillac car and she received from Cupp a similar bundle of papers and proceeded under affiant's surveillance to the same Apartment F, 110 North Burris Road, Compton; that on August 12, 1957, Cupp was observed again giving a parcel of papers to appellant at the same place of their previous meetings, that all of the foregoing meetings occurred about 6 p.m. on the days mentioned; that on August 13, 1957, at the same place about 6:14 p.m. Cupp again passed to appellant a similar parcel of papers; that on the last of such occasions affiant Fowler was accom-

panied by Agent Katayama and Deputy Sheriff Allen; and, quoting from Fowler's affidavit as to appellant.

"That the Los Angeles County Sheriff's Records Division shows the following previous convictions: 6 9 38—Los Angeles County—gambling, $500 fine; 4 4 46—Los Angeles S c Dept. 44—Bookmaking, 60 days, Susp.; LA[illegible] 6 mos. probation, $200 fine; SC file No. 109,240-11 28 49—Long Beach—gambling, $25 fine; 1 22 55—Compton—Compton MC 4202—betting, $25 or 10 days, Fine paid;"

In his affidavit, Fowler in part further stated that appellant has a reputation as a bookmaker, but has not had any arrests other than the ones above mentioned; that the above mentioned white slips of paper stated to have been received by appellant, in affiant Fowler's opinion based on his experience as an officer in the Sheriff Vice Detail, and as one qualified as an expert in State Courts, are professional betting markers of the type generally used by bookmakers.

Bublitz's affidavit so attached to Katayama's warrant supporting affidavit stated in part as follows:

"* * * That on January 23, 1957, a visual check made at 304 South Mayo, Compton, California, disclosed that a two-toned green Ford Automobile was observed in the garage at this location; that this location is known to me to be the home of C. H. Rutherford, who is a notorious bookmaker who has previously been arrested by the Sheriff's Department; that a check of the Department of Motor Vehicles disclosed that C. H. Rutherford owned a 1954 Cadillac automobile at that time; that previous to the meeting in which Mr. Maltby [an informant] was interrogated; he was seen in the company of Mr. Rutherford and subsequently in his 1954 blue Cadillac auto-

mobile; that on subsequent occasions the two-toned green Ford automobile described above was observed in the garage at 110 North Burris Avenue, Compton, California; that it bears license No. HCR 483 and is registered to a Monica Kissell, who is known to me by name and reputation as the girl friend of C. H. Rutherford; that C. H. Rutherford, Charles Hemmet Rutherford, alias Charles Hemmet, is known to the Bureau of Criminal Identification, State of California, FBI No. 450442, CII No. 487090, as a White Male American, 5'10½" tall, brown hair and blue eyes, 150 lbs.; age 36 in 1956 with two arrests for bookmaking and three for "gambling"; that Rutherford's modus operandi consists of operating a "relay-back office" operation in which the bettor never has contact with the actual bookie, but can only phone his bets into the telephone spot, in this manner the spot does not call the back-office and the telephone number is thus impossible to trace; that generally a resume and unrelayed wagers are passed to the bookie at some arranged meeting place at the terminaton of the day's activities; * * *"

Katayama's additional affidavit so attached to his warrant supporting affidavit stated in part as follows:

"* * * that I am a Special Agent, Intelligence Division, Internal Revenue Service, U. S. Treasury Department; that upon being advised on August 7, 1957, that a person known to the Los Angeles County Sheriff's Office as C. H. Rutherford was conducting large-scale bookmaking activities in the county area, an investigation was initiated in cooperation with that office;

"that on August 13, 1957, accompanied by Sheriff's Deputies, Howard Fowler and W. H. Allen a surveillance was placed on a parking lot on the northwest corner of Long Beach Blvd., and Myrrh Street, Compton, Cali-

fornia, beginning at 5:15 P.M.; that from our hidden observation post I saw a person, identified by the deputies as Howard Lee Cupp, drive into the parking lot in a two-tone green 1955 Ford Automobile bearing license No. AVB 201, accompanied by an unidentified female and a juvenile male, at approximately 6:07 P.M., and remained in their automobile; that at or about 6:14 P.M., a person identified to me by the deputies as Charles H. Rutherford, drove into the parking lot in a 1957 Cadillac automobile bearing 1957 California License No. MLR 406, and park in the lot immediately to the rear of Cupp's automobile; that Cupp left his car and walked to Rutherford's car and handed through the left front window opening with his right hand slips of white paper, stated a few words, at which time Rutherford proceeded to drive out of the location, and Cupp left almost immediately after; that approximately 15 minutes later, a visual check made at 110 North Burris Avenue, Compton, California, revealed that Rutherford's automobile was parked on the East side of the street facing north at that location;

"that a check of the files of the District Director of Internal Revenue; Los Angeles, California, disclosed that neither Howard Lee Cupp nor Charles H. Rutherford, or each of them, has purchased a special, occupational wagering tax stamp, nor has either of them filed Form 11-C, Excise Tax on Wagers; for the applicable period;

"that based upon previous investigative experience with bookmakers it is my opinion that the slips of paper handed to Rutherford by Cupp are betting markers used by bookmakers; * * *"

Appearing in the Transcript of Record in this case is appellant's "CONDENSED NARRATIVE STATEMENT OF TESTIMONY" in which he states:

"The defendant did not register or pay a wagering occupational tax required of one engaged in the business

of accepting and receiving wagers with respect to horse races.

"On several occasions between July 25, 1957 and August 15, 1957, the defendant was seen by Federal agents and Los Angeles County deputy sheriffs driving into an auto park adjoining Mark's Restaurant in Compton at approximately 6:00 P.M. On these occasions he would meet Howard Cupp (a co-defendant adjudged by Judge Westover not guilty of failing to pay a wagering occupational tax in a consolidated trial with the defendant), who approached the defendant's automobile and handed him a rolled up package of papers.

"On some occasions Monica Kissel (a co-defendant with Howard Cupp against whom the charges were dismissed on motion of the United States Attorney) met Howard Cupp at the place designated and received from him a rolled up package of papers.

"On one occasion an unidentified woman met the defendant at the place designated and handed him a package of rolled up papers.

"On August 15, 1957 at approximately 6:00 to 6:15 P.M. the defendant was seen by a deputy sheriff at the same auto park meeting Cupp and a package passing from Cupp to the defendant; shortly thereafter Federal Agent Katayama knocked on the door of Apartment F, 110 North Burris, Compton, California, and said: "Open up. We are federal officers and have a search warrant." After waiting 20 to 25 seconds and receiving no response the federal agent in the company of deputy sheriffs broke the door down and entered the apartment. He saw the defendant seated on couch stuffing some papers underneath the seat, and there was a brown paper bag containing a number of papers at his feet. A copy of

the search warrant was given to the defendant approximately twenty minutes before leaving the premises.

"It was stipulated that Deputy Sheriff Carl Seltzer would testify that pieces of paper in the brown paper bag and under the cushions of the couch contained notations of purported bets on horse races and figures showing the totalization of wins and losses on the said purported bets.

"All of these papers were seized by the federal agent at the said apartment.

"The handwriting of the purported bets was identified as the handwriting of Howard Cupp, and the handwriting of the totalization figures showing the wins or losses was identified as the handwriting of the defendant.

"Federal Agents Ness and Katayama held a conversation with the defendant at the said apartment on August 15, 1957 in which they asked him what the papers were and the defendant replied that they were betting markers that he picked up from a clerk of Swede's at the Mark's Restaurant auto park. The defendant was asked what he was doing with them, and he replied that he was just figuring the wins and losses and that Swede would come around about 10:00 o'clock each night and pick them up. The defendant stated he was getting $150.00 a week for his services. When asked if he knew he was required to have a wagering stamp, he said he did not need a stamp because he was not a bookmaker. * * *"

As against appellant's contention (1), we hold that such supporting affidavits were, as found by the Commissioner, sufficient to show probable cause for issuance of the search warrant within the rule of Brinegar vs. U. S., 338 U. S. 160, 93 L. ed. 1879, (which explains

or disapproves former cases relied upon by appellant and that the Trial Court properly denied the motion to suppress.

As to appellant's contention (2), all of the evidence, except the supporting affidavits for the search warrant, received at the Trial Court hearing on appellant's motion to suppress the seized physical evidence was received in evidence also at the later trial on the merits when such seized physical evidence in the form of exhibits was so received, with the further exception that the statement made by Cupp in his own handwriting when he was arrested and certain statements by Cupp in one or more of such exhibits as to the part played by appellant and the relationship between appellant and Cupp in the matters charged against appellant were on appellant's motion stricken out by the Trial Court.

There was before the Court a great mass of evidence of repeated transactions of appellant personally receiving from one or more persons at the North Burris apartment in Compton, which apartment was not appellant's residence, and of his making up or using betting markers, scratch sheets and owe sheets and of determining the amounts of wins and losses, thus furnishing indispensable final information to him or his agent for use in final payoffs. There was the stipulation that Officer Seltzer would testify that some of the pieces of paper in the brown paper bag and of those stuffed under the couch contained notations of purported horse race bets. It is reasonable to find from all of such evidence that appellant was not a mere runner or pick-up man, but was the real principal in his own business of accepting wagers as charged.

Although the case was tried by the Court without a jury, it was competent for the Court to consider circum-

stantial evidence and reasonable inferences to be drawn from all the evidence along with the direct evidence in the case with like effect as if the trier of the facts had been a jury instead of the Court. After fairly and impartially considering all of the direct and circumstantial evidence and the reasonable inferences to be drawn therefrom a fair and impartial jury would, we believe, have been, and the Trial Court was, justified in finding the appellant guilty as charged.

We, therefore, hold that the evidence before the Trial Court was sufficient to support its finding and conviction of guilt and sentence of appellant, and that in doing so that Court committed no reversible error.

Finally, we reject appellant's contention (3) that the evidence does not establish the Trial Court's venue, because most if not all of the above transactions of appellant occurred in Compton, California; and if it were true that there is now in the record no sufficient evidence that Compton is in Los Angeles County which County by statute (28 U. S. C. §84) is within the Trial Court's venue, still this Court in this case may properly and does take judicial notice of that, namely, that Compton is in that County and is within the Central Division of the Southern District of California. Davis vs. U. S., 9 Cir., 185 F. 2d 938, 943, cert. den. 340 U. S. 932; Goldstein vs. U. S., 256 F. 813; U. S. vs. Anderson, 60 F. Supp. 649.

The Trial Court's action appealed from in this case is AFFIRMED.

(Endorsed:) Opinion. Filed Jan. 28, 1959.

Paul P. O'Brien, Clerk.

EXHIBIT "B."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Charles H. Rutherford, Appellant, vs. United States of America, Appellee. No. 15,885.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers and Hamley, Circuit Judges, and Bowen, District Judge.

BOWEN, District Judge:

This is an appeal by appellant from his conviction and $2,500 fine imposed by the United States District Court for the Southern District of California, Central Division, for his willful failure to register and pay a horse race wagering occupational tax as required by Sections 4411 and 4412, Internal Revenue Code, 1954, and in violation of Section 7203, Title 26, U. S. Code. The case was tried by the court without a jury upon an Information filed by the United States Attorney, charging in substance

That during the tax year beginning July 1, 1957 and up to and including August 15, 1957, appellant engaged in the business of accepting wagers on horse races and received such wagers within the meaning of Section 4401c, U. S. Code, and that because of such activity appellant was required by Sections 4411 and 4412, Internal Revenue Code, 1954 to register and pay the wagering occupational tax to the Internal Revenue District Director at Los Angeles within the Central Division of the Southern District of California, and that the appellant, well knowing those facts, did willfully and knowingly fail to register and pay

such District Director or any other proper officer of the United States, in violation of Section 7203, Title 26, U. S. C.

The principal contentions of appellant are (1) that the evidence stated in the supporting affidavits was insufficient to show probable cause for issuing the search warrant used to obtain certain seized papers which were later admitted at the trial to prove the charges of the Information against the appellant, and that the motion to suppress that evidence should have been granted, (2) that the evidence was insufficient to support the conviction and sentence of appellant, and (3), that the evidence did not sufficiently establish venue in the Trial Court, where in appropriate proceedings all these contentions were timely raised by appellant, but in each instance the Trial Court ruled adversely to appellant.

Of two other defendants tried with appellant but charged in a separate related case, one was dismissed upon appellee's motion and the other was adjudged not guilty.

On the occasion of the search and seizure of the papers, appellant was seen sitting on a couch stuffing some papers under the seat and a brown paper bag containing a number of papers was on the floor near his feet. By stipulation it was admitted that Deputy Sheriff Seltzer would testify that pieces of paper in the paper bag and those stuffed under the couch cushions contained notations of purported bets on horse races and figures showing totals of wins and losses on those bets.

In conversation with federal agents at that time, appellant said those papers were betting markers received by him from a clerk of Swede's (not otherwise identified by appellant) at the auto park identified in the evidence as a meeting place where appellant was said to have previ-

ously received rolls of paper from other named persons. Appellant also then said that he was using those papers to figure wins and losses, that Swede would pick them up nightly about 10 o'clock, that he was getting $150 weekly for his services, and when asked if he knew he was required to have a wagering (tax) stamp he said he did not need one because he was not a bookmaker.

As to appellant's contention (1), at the Trial Court hearing on appellant's motion to suppress the evidence for alleged lack of probable cause for issuing the search warrant, four supporting affidavits were brought into question.

The so-called affidavit for search warrant was made by Federal Special Agent Katayama stating that he "* * * has reason to believe that on the premises known as apartment F, 110 North Burris Road, Compton, California, in the Southern District of California, there is now being concealed certain property, namely betting markers, 'owe sheets', 'scratch' sheets, money, telephones, pencils, record paper, and other equipment and bookmaking paraphernalia which are being used in violating the Internal Revenue laws pertaining to wagering, Sections 4401, 4411 and 4412, Internal Revenue Code 1954. And that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: The affidavits attached hereto are incorporated by reference herein. * * *"

So attached were three more affidavits,—one each by Deputy Sheriffs Howard Fowler and Calvin Bublitz and an additional one by Katayama.

Fowler's affidavit so attached stated in substance and effect, among other things, that on August 1, 1957, he observed and heard one of his confidential informants dial a certain telephone number and place a bet on a horse

race. Fowler then located the address of the place to which was assigned the number dialed by the informant and observed Howard Lee Cupp, who was acquitted as one of the defendants in the related case tried with this one, leave that place address, and drive to an auto park adjoining Mark's Restaurant at the corner of Long Beach Boulevard and Myrrh Street, Compton, California, and after Cupp waited there about five minutes, the appellant drove to that street corner address in a 1957 Cadillac, license number MLR406, and then Cupp passed to appellant a parcel containing white slips of paper and thereupon appellant drove away and while under constant surveillance was trailed to Apartment F, 110 North Burris Avenue, Compton, California, and into that location appellant was observed to carry said parcel of papers;

That on July 26 and 30, and August 5, 1957, Cupp arrived at the same Long Beach Boulevard and Myrrh Street address and passed similar parcels of paper to appellant; that on two of these occasions appellant used a Ford car and on the other occasion he used said Cadillac car; that on each of those occasions appellant after so receiving the papers proceeded to the North Burris Road location in Compton; that on July 27, 1957 Cupp was met at that address by a woman known to affiant as the friend of appellant and who was driving said 1957 Cadillac car and she received from Cupp a similar bundle of papers and proceeded under affiant's surveillance to the same Apartment F, 110 North Burris Road, Compton; that on August 12, 1957 Cupp was observed again giving a parcel of papers to appellant at the same place of their previous meetings, that all of the foregoing meetings occurred about 6 p.m. on the days mentioned; that on August 13, 1957, at the same place about 6:14 p.m., Cupp again

passed to appellant a similar parcel of papers; that on the last of such occasions affiant Fowler was accompanied by Agent Katayama and Deputy Sheriff Alle. ; and, quoting from Fowler's affidavit as to appellant,

> "That the Los Angeles County Sheriff's Records Division shows the following previous convictions: 6/9/38—Los Angeles County—gambling, $500 fine; 4/4/46—Los Angeles S/c Dept. 44—Bookmaking, 60 days, Susp.; LACJ—6 mos. probation, $200 fine; SC file No. 106246; 11/28/49—Long Beach—gambling, $25 fine; 1/22/55—Compton—Compton MC 4202—betting, $25 or 10 days, Fine paid;"

In his Affidavit, Fowler in part further stated that appellant has a reputation as a bookmaker, but has not had any arrests other than the ones above mentioned; that the above mentioned white slips of paper stated to have been received by appellant, in affiant Fowler's opinion based on his experience as an officer in the Sheriff Vice Detail, and as one qualified as an expert in State Courts, are professional betting markers of the type generally used by bookmakers.

Bublitz's Affidavit so attached to Katayama's warrant supporting affidavit stated in part as follows:

> "* * * That on January 23, 1957, a visual check made at 304 South Mayo, Compton, California, disclosed that a two-toned green Ford Automobile was observed in the garage at this location; that this location is known to me to be the home of C. H. Rutherford, who is a notorious bookmaker who has previously been arrested by the Sheriff's Department; that a check of the Department of Motor Vehicles disclosed that C. H. Rutherford owned a 1954

Cadillac automobiles at that time; that previous to the meeting in which Mr. Maltby [an informant] was interrogated, he was seen in the company of Mr Rutherford and subsequently in his 1954 blue Cadillac automobile; that on subsequent occasions the two-toned green Ford automobile described above was observed in the garage at 110 North Burris Avenue, Compton, California; that it bears license No. HCR 483 and is registered to a Monica Kissell, who is known to me by name and reputation as the girl-friend of C. H. Rutherford; that C. H. Rutherford, Charles Hemmet Rutherford, alias Charles Hemmet, is known to the Bureau of Criminal Identification, State of California, FBI No. 456442, CII No. 487690, as a White Male American, 5'-10½" tall, brown hair and blue eyes, 150 lbs., age 36 in 1956, with two arrests for bookmaking and three for "gambling"; that Rutherford's modus operandi consists of operating a "relay-back office" operation in which the bettor never has contact with the actual bookie, but can only phone his bets into the telephone spot, in this manner the spot does not call the back-office and the telephone number is thus impossible to trace; that generally a résumé and unrelayed wagers are passed to the bookie at some arranged meeting place at the termination of the day's activities; * * *"

Katayama's additional affidavit so attached to his warrant supporting affidavit stated in part as follows:

"* * * That I am a Special Agent, Intelligence Division, Internal Revenue Service, U. S. Treasury Department; that upon being advised on August 7, 1957, that a person known to the Los Angeles County

Sheriff's Office as C. H. Rutherford was conducting large-scale bookmaking activities in the county area, an investigation was initiated in cooperation with that office;

"That on August 13, 1957, accompanied by Sheriff's Deputies, Howard Fowler and W. H. Allen a surveillance was placed on a parking lot on the northwest corner of Long Beach Blvd. and Myrrh Street, Compton, California, beginning at 5:15 P.M.; that from our hidden observation post I saw a person, identified by the deputies as Howard Lee Cupp, drive into the parking lot in a two-tone green 1955 Ford Automobile bearing license No. AVB 201, accompanied by an unidentified female and a juvenile male, at approximately 6:07 P.M., and remained in their automobile; that at or about 6:14 P.M., a person identified to me by the deputies as Charles H. Rutherford, drove into the parking lot in a 1957 Cadillac automobile bearing 1957 California License No. MLR 400, and park in the lot immediately to the rear of Cupp's automobile; that Cupp left his car and walked to Rutherford's car and handed through the left front window opening with his right hand slips of white paper, stated a few words, at which time Rutherford proceeded to drive out of the location, and Cupp left almost immediately after; that approximately 15 minutes later, a visual check made at 110 North Burris Avenue, Compton, California, revealed that Rutherford's automobile was parked on the East side of the street facing north at that location;

"that a check of the files of the District Director of Internal Revenue, Los Angeles, California, disclosed that neither Howard Lee Cupp nor Charles H. Rutherford or each of them, has purchased a special occu-

gational wagering tax stamp, nor has either of them filed Form 11-C, Excise Tax on Wagers; for the applicable period;

"that based upon previous investigative experience with bookmakers it is my opinion that the slips of paper handed to Rutherford by Cupp are betting markers used by bookmakers; * * *"

Appearing in the Transcript of Record in this case is appellant's "CONDENSED NARRATIVE STATEMENT OF TESTIMONY" in which he states:

"The defendant did not register or pay a wagering occupational tax required of one engaged in the business of accepting and receiving wagers with respect to horse races.

"On several occasions between July 25, 1957 and August 15, 1957, the defendant was seen by Federal agents and Los Angeles County deputy sheriffs driving into an auto park adjoining Mark's Restaurant in Compton at approximately 6:00 P.M. On these occasions he would meet Howard Cupp (a co-defendant adjudged by Judge Westover not guilty of failing to pay a wagering occupational tax in a consolidated trial with the defendant), who approached the defendant's automobile and handed him a rolled up package of papers.

"On some occasions Monica Kissel (a co-defendant with Howard Cupp against whom the charges were dismissed on motion of the United States Attorney) met Howard Cupp at the place designated and received from him a rolled up package of papers.

"On one occasion an unidentified woman met the defendant at the place designated and handed him a package of rolled up papers.

"On August 15, 1957 at approximately 6:00 to 6:15 P.M. the defendant was seen by a deputy sheriff at the same auto park meeting Cupp and a package passing from Cupp to the defendant; shortly thereafter Federal Agent Katayama knocked on the door of Apartment F, 110 North Burris, Compton, California, and said: "Open up. We are federal officers and have a search warrant." After waiting 20 to 25 seconds and receiving no response, the federal agent in the company of deputy sheriffs broke the door down and entered the apartment. He saw the defendant seated on a couch stuffing some papers underneath the seat, and there was a brown paper bag containing a number of papers at his feet. A copy of the search warrant was given to the defendant approximately twenty minutes before leaving the premises.

"It was stipulated that Deputy Sheriff Carl Seltzer would testify that pieces of paper in the brown paper bag and under the cushion of the couch contained notations of purported bets on horse races and figures showing the totalization of wins and losses on the purported bets.

"All of these papers were seized by the federal agent at the said apartment.

"The handwriting of the purported bets was identified as the handwriting of Howard Cupp, and the handwriting of the totalization figures showing the wins or losses was identified as the handwriting of the defendant.

"Federal Agents Ness and Katayama held a conversation with the defendant at the said apartment on August 15, 1957 in which they asked him what the papers were and the defendant replied that they

were betting markers that he picked up from a clerk of Swede's at the Mark's Restaurant auto park. The defendant was asked what he was doing with them, and he replied that he was just figuring the wins and losses and that Swede would come around about 10:00 o'clock each night and pick them up. The defendant stated he was getting $150.00 a week for his services. When asked if he knew he was required to have a wagering stamp, he said he did not need a stamp because he was not a bookmaker. * * *"

As against appellant's contention (1), we hold that such supporting affidavits were, as found by the Commissioner, sufficient to show probable cause for issuance of the search warrant within the rule of Brinegar vs. U. S., 338 U.S. 160, 93 L. ed. 1879; (which explains or disapproves former cases relied upon by appellant) and that the Trial Court properly denied the motion to suppress.

As to appellant's contention (2), all of the evidence, except the supporting affidavits for the search warrant, received at the Trial Court hearing on appellant's motion to suppress the seized physical evidence was received in evidence also at the later trial on the merits when such seized physical evidence in the form of exhibits was so received, with the further exception that the statement made by Cupp in his own handwriting when he was arrested and certain statements by Cupp in one or more of such exhibits as to the part played by appellant and the relationship between appellant and Cupp in the matters charged against appellant were on appellant's motion stricken out by the Trial Court.

"There was before the Court a great mass of evidence of repeated transactions of appellant personally receiving from one or more persons at the North Burris apartment

in Compton, which apartment was not appellant's residence, and of his making up or using betting markers, scratch sheets and owe sheets and of determining the amounts of wins and losses, thus furnishing indispensable final information to him or his agent for use in final pay-offs. There was the stipulation that Officer Seltzer would testify that some of the pieces of paper in the brown paper bag and of those stuffed under the couch seat contained notations of purported horse race bets.

A strong circumstance against appellant's contention that he was merely a bookkeeper and not a bookmaker was that much of that large amount of bookmaking material in evidence as exhibits consisted of owe sheets of the kind appellant said he used to figure the wins and losses and which he said were nightly picked up by "Swede," but those owe sheets, which were among the betting papers seized under the search warrant after appellant was seen stuffing them under the couch seat on which he had been sitting or were in a brown paper bag on the floor near his feet, pertained not to only one racing day, but were the win-loss owe sheets made up and accumulated by appellant over the period of about 18 days of racing from July 29 to August 15, 1957. These obviously had not nightly been picked up by "Swede" as appellant said was done, and as most likely would have been done if appellant had been a mere bookkeeper.

Another significant circumstance against appellant was that, at the same parking lot rendezvous on a number of occasions before his arrest, eyewitnesses saw him receive from runners or pick-up men sheets of paper of the kind used by bookmakers and observed that immediately thereafter appellant went to the very same apartment address where he was arrested and where the bookmaking

material was seized under the search warrant. That address was not his home, but was, as we are and apparently the Trial Court beyond a reasonable doubt was convinced, the place where appellant, as a principal conducted his own extensive bookmaking business. That conclusion and also the fact that appellant was not a mere bookkeeper, runner or pick-up man find ample support from a fair consideration of all the foregoing evidence.

Although the case was tried by the Court without a jury, it was competent for the Court to consider circumstantial evidence and reasonable inferences to be drawn from all the evidence along with the direct evidence in the case with like effect as if the trier of the facts had been a jury instead of the Court. After fairly and impartially considering all of the direct and circumstantial evidence and the reasonable inferences to be drawn therefrom a fair and impartial jury would, we believe, have been, and the Trial Court was, justified in finding the appellant guilty as charged.

We, therefore, hold that the evidence before the Trial Court was sufficient to support its finding and conviction of guilt and sentence of appellant, and that in doing so that Court committed no reversible error.

Finally, we reject appellant's contention (3) that the evidence does not establish the Trial Court's venue, because most if not all of the above transactions of appellant occurred in Compton, California, and if it were true that there is now in the record no sufficient evidence that Compton is in Los Angeles County which County by statute (28 U.S.C. § 84) is within the Trial Court's venue, still this Court in this case may properly and does take judicial notice of that, namely, that Compton is in that County and is within the Central Division of the Southern District

of California. Davis vs. U. S., 9 Cir., 185 F. 2d 938, 943, cert. den. 340 U. S. 932; Goldstein vs. U. S., 256 F. 813; U. S. vs. Anderson, 60 F. Supp. 649.

The Trial Court's action appealed from in this case is AFFIRMED.

(Endorsed:) Opinion. Filed Jan. 28, 1959, as amended by order of March 17, 1959.

Paul P. O'Brien, Clerk.

EXHIBIT "C."

In the United States Court of Appeals for the Ninth Circuit.

Charles H. Rutherford, Appellant, vs. United States of America, Appellee. No. 15885.

Before: CHAMBERS and HAMLEY, Circuit Judges and BOWEN, District Judge.

BOWEN, District Judge.

Upon consideration of appellant's petition for rehearing and his suggestion that such rehearing be held en banc, we adhere to this Court's opinion filed herein January 28, 1959, believing that said opinion with amendments referred to below is correct upon the particular facts and applicable law in this case;

It is, therefore, ORDERED that the word "seat" be inserted after "couch" near the end of the fifth line, counting from the top, of page 10 of the typed opinion (being the tenth line of the first paragraph of page 9 of the slipsheet opinion), and that the sentence "It is reasonable to find from all of such evidence that appellant was not a mere runner or pick-up man, but was the real principal in his own business of accepting wagers as charged." beginning near the end of the sixth line and continuing to the end of the ninth line, counting from the top, on page 10 of the typed opinion (being the last sentence of the first paragraph on page 9 of the slipsheet opinion) be stricken and that Exhibit A hereto attached, consisting of two new paragraphs, be substituted for and in the place of such stricken sentence, and

That appellant's petition for rehearing be denied and his suggestion for an en banc rehearing be rejected.

Richard H. Chambers
United States Circuit Judge

Frederick G. Hamley
United States Circuit Judge.

John C. Bowen
United States District Judge.

(Endorsed).

Filed Mar 17, 1959

Paul P. O'Brien, Clerk.

"EXHIBIT A."

A strong circumstance against appellant's contention that he was merely a bookkeeper and not a bookmaker was that much of that large amount of bookmaking material in evidence as exhibits consisted of owe sheets of the kind appellant said he used to figure the wins and losses and which he said were nightly picked up by "Swede," but those owe sheets, which were among the betting papers seized under the search warrant after appellant was seen stuffing them under the couch seat on which he had been sitting or were in a brown paper bag on the floor near his feet, pertained not to only one racing day, but were the win-loss owe sheets made up and accumulated by appellant over the period of about 18 days of racing from July 29 to August 15, 1957. These obviously had not nightly been picked up by "Swede" as appellant said was done, and as most likely would have been done if appellant had been a mere bookkeeper.

Another significant circumstance against appellant was that, at the same parking lot rendezvous on a number of occasions before his arrest, eye witnesses saw him receive from runners or pick-up men sheets of paper of the kind used by bookmakers and observed that immediately thereafter appellant went to the very same apartment address where he was arrested and where the bookmaking material was seized under the search warrant. That address was not his home, but was, as we are and apparently the Trial Court beyond a reasonable doubt was convinced, the place where appellant as a principal conducted his own extensive bookmaking business. That conclusion and also the fact that appellant was not a mere bookkeeper, runner or pick-up man find ample support from a fair consideration of all the foregoing evidence.

No. 537

In the Supreme Court of the United States

OCTOBER TERM, 1906

CHARLES H. RUTHERFORD, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and rule involved	2
Statement	4
Argument	9
Conclusion	13

CITATIONS

Cases:

Beach v. *United States*, 240 F. 2d 888	13
Brinegar v. *United States*, 338 U.S. 160	10
Dean v. *United States*, 246 F. 2d 335	13
Draper v. *United States*, 358 U.S. 307	10
Epps v. *United States*, 157 F. 2d 11	12
Grau v. *United States*, 287 U.S. 124	10
Kahn v. *United States*, 251 F. 2d 160, certiorari denied, 356 U.S. 918	12
United States v. *Bowman*, 137 F. Supp. 385	13
United States v. *Calamaro*, 354 U.S. 351	11
United States v. *Cudwich*, 149 F. Supp. 356, affirmed, 241 F. 2d 54	12
United States v. *Echeles*, 222 F. 2d 141, certiorari denied, 350 U.S. 828	13
United States v. *Palese*, 133 F. 2d 600	12

Statutes and rule:

26 U.S.C. (1952 Ed., Supp. V):	
4401, 68A Stat. 525	2, 11
4411, 68A Stat. 527	3, 5
4412, 68A Stat. 527	3, 5
7203, 68A Stat. 851	2, 4
28 U.S.C. 84	13
Rule 11, Federal Rules of Criminal Procedure	4

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 837

CHARLES H. RUTHERFORD, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 52-61; Pet. App. B), after modification, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1959 (R. 62). A petition for rehearing was denied on March 17, 1959 (R. 63). The petition for a writ of certiorari was filed on April 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a search warrant, based primarily upon personal knowledge of the affiants but also upon some hearsay, justified the seizure from petitioner, and use in evidence, of betting paraphernalia.

2. Whether the evidence was sufficient to support petitioner's conviction for failure to register and pay the required federal tax with respect to horse racing wagers.

3. Whether the prosecution established proper venue.

STATUTES AND RULE INVOLVED

26 U.S.C. (1952 Ed., Supp. V) 7203, 68A Stat. 851, provides:

> *Willful failure to file return, supply information, or pay tax:*
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. (1952 Ed., Supp. V) 4401, 68A Stat. 525, provides:

* * * *

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C. (1952 Ed., Supp. V) 4411, 68A Stat. 527, provides:

Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. (1952 Ed., Supp. V) 4412, 68A Stat. 527, provides:

Registration.

(a) *Requirement.*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under

subchapter A, the name and place of residence of each such person.

* * * * *

Rule 41, Federal Rules of Criminal Procedure, provides:

* * * * *

(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

* * * * *

STATEMENT

Petitioner was charged by information in the United States District Court for the Southern District of California with a violation of 26 U.S.C. 7203.

supra, p. 2, alleging wilful failure to register and pay the wagering occupational tax required by 26 U.S.C. 4411 and 4412, *supra*, pp. 3-4 (R. 3). In a non-jury trial he was found guilty and fined $2500 (R. 37-38). On appeal (R. 39), his conviction was affirmed (R. 62; Pet. App. B).

1. On August 15, 1957, federal agent Katayama made an affidavit for a search warrant before a United States Commissioner, stating that he had "* * * reason to believe that on the premises known as Apartment F, 110 North Burris Road, Compton, California, in the Southern District of California, there is now being concealed certain property, namely betting markers, 'owe sheets', 'scratch' sheets, money, telephones, pencils, record paper, and other equipment and book-making paraphernalia, which are being used in violating the Internal Revenue laws pertaining to wagering, Sections 4401, 4411 and 4412, Internal Revenue Code, 1954. * * *" As grounds for the search warrant, there were attached three additional affidavits, one each by deputy sheriffs Fowler and Bublitz and one by agent Katayama (R. 25-33).

Fowler's affidavit stated that on August 1, 1957, he heard his confidential informant dial a certain telephone number and place a wager on a horse race. Police surveillance at the address at which this telephone was listed showed that one Howard Lee Cupp[1] left there at 5:50 p.m., and drove to the northwest corner of Long Beach Boulevard and Myrrh Street,

[1] Cupp was found by the trial judge to be not guilty of failing to pay a wagering occupational tax (R. 13-41).

Compton, California. About five minutes later, petitioner arrived in a Cadillac, and Cupp passed to petitioner a parcel containing white slips of paper. Petitioner was trailed to the North Burris Road apartment into which he carried the parcel of papers (R. 26-27). On July 26 and 30, and on August 5, 1957, at about 6:00 p.m., Cupp was observed to pass similar parcels of paper to petitioner at the same location, petitioner driving a Ford on two occasions. Each time petitioner proceeded to the North Burris Road apartment after receiving the papers from Cupp. On August 12 and August 13, 1957, at about 6:00 p.m., Cupp was again observed giving parcels of paper to petitioner at the same location (R. 27-28).

According to Fowler's informant, petitioner had a reputation as a bookmaker and had taken over the business of his father, a notorious bookmaker in the area. Petitioner was believed to use the "back office" operation where the bookie is not known to the bettors, and the only contact with the bookie is by the telephone "spot" employee (R. 28). Fowler, as an experienced police officer, was of the opinion that the white slips of paper passed to petitioner by Cupp were "professional betting markers of the type generally used by bookmakers" (R. 28-29).

Katayama's affidavit stated that on August 13, 1957, at about 6:14 p.m., he saw Cupp hand some slips of white paper to petitioner in his Cadillac and about fifteen minutes later petitioner's Cadillac was seen near the North Burris Road apartment. A check of internal revenue files showed that neither

Cupp nor petitioner had purchased a wagering tax stamp or paid the wagering tax.

Deputy sheriff Bublitz, in his affidavit, stated that on January 22, 1957, he interviewed one Earl Maltby, who stated that he had been accepting wagers on race horses on behalf of a person known to him only as "C.H." (petitioner's first initials). Maltby delivered each day's "action" at a prearranged meeting place at about 2:00 p.m. to a "male person about 36 years old, about 6 feet tall, with black hair and of a slight build, and who drove a 1954 Cadillac automobile." On several occasions Maltby was met by a woman who drove a green Ford (R. 31-32). On January 23, 1957, a check at petitioner's residence disclosed the green Ford in his garage. This Ford, registered in the name of Monica Kissell,[2] who was known to the affiant as petitioner's girl friend, was observed on several occasions in the garage at 110 North Burris Road. Prior to the time Maltby had been interviewed, he had been seen with petitioner in his 1954 blue Cadillac (R. 32-33). Petitioner was known to be "5' 10½" tall, brown hair and blue eyes, 150 lbs., age 36 in 1956, with two arrests for bookmaking and three for 'gambling'" (R. 33).

The search warrant was issued on August 15, 1957, and executed on the same day by agent Katayama. Betting paraphernalia, including a number of betting markers, a radio, and a telephone, were

[2] The charges against Monica Kissell, a co-defendant with petitioner and Cupp, were dismissed, on motion of the United States Attorney (R. 11).

seized under the search warrant (R. 22-24). A motion to suppress this evidence, on the ground that it had been unlawfully seized (R. 18-19), was denied (R. 34).

2. The evidence adduced at the trial, set out in petitioner's "condensed narrative statement of testimony" (R. 43-45), may be stated as follows:

On several occasions between July 25 and August 15, 1957, federal agents and state deputy sheriffs saw petitioner driving into an auto park adjoining Mark's Restaurant in Compton, California, at about 6:00 p.m. At these times, petitioner would meet Howard Cupp, who handed him a rolled up package of papers (R. 43-44). On some occasions at this location, Monica Kissell received from Cupp a rolled up package of papers, and once an unidentified woman handed such a package to petitioner (R. 44).

On August 15, 1957, at about 6:00 p.m., a deputy sheriff at the same auto park saw Cupp pass a package to petitioner. Shortly thereafter, agent Katayama knocked on the door of Apartment F, 110 North Burris Road, and said: "Open up. We are federal officers and have a search warrant." After failing to obtain a response and being forced to break the door for entry, the agent saw petitioner seated on a couch stuffing some papers underneath the seat with a brown paper bag containing papers at his feet. There was a stipulation that deputy sheriff Seltzer "would testify that pieces of paper in the brown paper bag and under the cushion of the couch contained notations of purported bets on horse races and figures showing the totalization of wins and

losses on the said purported bets" (R. 44-45). The handwriting of the bets was identified as that of Cupp, and the handwriting of the totalization figures was identified as that of petitioner. All of these papers were seized by the federal agent (R. 45).

In a conversation which federal agents had with petitioner at the apartment on August 15, 1957, "they asked him what the papers were and [petitioner] replied that they were betting markers that he picked up from a clerk of Swede's at the Mark's Restaurant auto park. [Petitioner] was asked what he was doing with them, and he replied that he was just figuring the wins and losses and that Swede would come around about 10:00 o'clock each night and pick them up. [Petitioner] stated he was getting $150.00 a week for his services. When asked if he knew he was required to have a wagering stamp, he said he did not need a stamp because he was not a bookmaker" (R. 45).

Petitioner did not register or pay a wagering occupational tax required of one engaged in the business of accepting and receiving wagers with respect to horse races (R. 43).

ARGUMENT

1. The contention (Pet. 9-14) that the affidavits on which the search warrant was based were not sufficient to show probable cause is without merit. These affidavits were not grounded solely on hearsay and conclusions; they contained specific statements of fact as to what the federal agent and the deputy sheriffs had personally observed. *Supra*, pp. 5-7. The

officers had seen Cupp on numerous occasions pass the parcels containing the white slips of paper to the petitioner at the usual rendezvous, and had also watched the petitioner drive with these papers to the North Burris Road apartment. Deputy sheriff Bublitz had seen his informant, Maltby, riding in petitioner's Cadillac; and when Maltby told Bublitz that he was the telephone "spot" man for "C.H." and described this person, the description corresponded with the one which the California Bureau of Criminal Identification had for the petitioner. The officers had the right to connect their physical observations with their significant hearsay information, as well as their knowledge of local professional gambling activities (*supra*, pp. 6-8). All the facts together operated to establish probable cause for the belief that petitioner was an important bookmaker. Even though hearsay is not legally competent in a criminal case, this Court has made it clear that there is a difference in the requirements for a finding of guilt in a criminal case and probable cause for an arrest or for a search and seizure, with much more latitude allowed for the reception of evidence to show probable cause. *Brinegar* v. *United States*, 338 U.S. 160, 172-174; *Draper* v. *United States*, 358 U.S. 307, 310-312.[8]

---

[8] The dictum in *Grau* v. *United States*, 287 U.S. 124, 128 (Pet. 11), relied upon by petitioner, has been rejected in *Brinegar* v. *United States*, *supra*, 338 U.S. at 174, footnote 13, and in *Draper* v. *United States*, *supra*, 358 U.S. at 312, footnote 4.

2. Contrary to petitioner's contention (Pet. 15-18), the evidence was sufficient to support his conviction. He erroneously argues that there was no showing that he was "engaged in the business of accepting wagers" within 26 U.S.C. 4401(c) (*supra*, pp. 2-3), and implies that he occupied a position of immunity similar to that of a "pick-up man", who, this Court held in *United States* v. *Calamaro*, 354 U.S. 351, is not subject to a wagering tax.

But petitioner was clearly charged in the information as a principal, not as a "pick-up man" (R. 3). The bill of particulars furnished pursuant to his motion indicated numerous specific instances where he had accepted horse betting wagers either individually or as principal through the agency of Cupp (R. 9-17). And the evidence, although to a certain extent circumstantial, was sufficient to show petitioner's guilt as a principal. He was seen on numerous occasions receiving rolled up packages of papers from Cupp and once from an unidentified woman[4] at a usual rendezvous. On August 15, 1957, after witnessing the usual procedure and following petitioner to his North Burris Road apartment which he used for his bookmaking operations, the officers with the aid of the search warrant found petitioner with a number of papers containing notations of bets in Cupp's handwriting and the totalization of wins and losses on these bets in petitioner's handwriting. Petitioner admitted that these were betting

[4] It was a reasonable inference from the attendant circumstances for the court to infer that these people were "runners or pick-up men" (R. 60).

markers. It was also undisputed that petitioner had not registered or paid the required wagering occupational tax.

Petitioner's acceptance of bets occurred not in isolated instances, but in the course of a regular engagement in the betting business. Cf. *Kahn* v. *United States*, 251 F. 2d 160 (C.A. 9), certiorari denied, 356 U.S. 918. As the court below pointed out (Pet. App. B 22), the win-loss owe sheets taken from petitioner covered a period of racing from July 29 to August 15, 1957 (R. 60, 9-16). These owe sheets obviously had not been picked up each night by "Swede", as petitioner had stated in a futile attempt to show that he was a mere bookkeeper and not a bookmaker (R. 60). Petitioner argues that since the government introduced his statement as part of its case, it was bound (in the absence of specific proof to the contrary) by his self-serving assertion that he did not need a wagering tax stamp because he was not a bookmaker (Pet. 17). The trier of fact could, however, properly credit only that part of a petitioner's statement which accorded with the other facts proved at the trial. The government was entitled to show all the circumstances surrounding the execution of the search warrant, including petitioner's contemporaneous statement, and was not bound by the exculpatory matter in the statement which also contained important admissions. Cf. *Epps* v. *United States*, 157 F. 2d 11, 12 (C.A. D.C.); *United States* v. *Cindrich*, 140 F. Supp. 356, 359 (W.D. Pa.), affirmed, 241 F. 2d 54 (C.A. [illegible]), and see *United States* v. *Palese*, 133 F. 2d [illegible] (C.A. 3).

3. Finally, petitioner's contention that the prosecution did not establish proper venue is without substance (Pet. 18-19). The venue of the prosecution for non-payment of the wagering tax was the place where the business of wagering was being carried on. *United States* v. *Bowman*, 137 F. Supp. 385, 387 (D. D.C.); *Beach* v. *United States*, 240 F. 2d 888 (C.A. D.C.). The evidence showed that petitioner's betting business was conducted in Compton, California, where the rendezvous at the auto park adjoining Mark's Restaurant and petitioner's North Burris Road apartment were located (R. 43, 44). The court below properly took judicial notice that Compton is in Los Angeles County, which under 28 U.S.C. 84 is within the District Court's venue. *United States* v. *Echeles*, 222 F. 2d 144, 158 (C.A. 7), certiorari denied, 350 U.S. 828; *Dean* v. *United States*, 246 F. 2d 335, 338 (C.A. 8).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959

IN THE

Supreme Court of the United States

October Term, 1958.

No. 837.

CHARLES H. RUTHERFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,
202 South Hamilton Drive,
Beverly Hills, California,
Attorneys for Petitioner Charles H. Rutherford.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

IN THE

Supreme Court of the United States

October Term, 1958.

No. 837.

CHARLES H. RUTHERFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Petitioner CHARLES H. RUTHERFORD submits herewith his Reply Brief to the Brief for the United States.

Petitioner relies on his Petition for Writ of Certiorari as the answer to the Government's Brief, and in addition thereto, submits the following:

The Government's Opposition Brief on page 11 states, "The Bill of Particulars furnished pursuant to his (petitioner) motion indicated numerous specific instances where he had accepted horse betting wagers either individually or as a principal through the agency of Cupp" . . . "and the evidence, although to a certain extent circumstantial, was sufficent to show petitioner's guilt as a principal."

It should be noted that the record is completely silent as to the petitioner or Cupp actually having accepted any

horse betting wagers set forth in the Bill of Particulars. The only thing that might be considered by the Government as supporting the contention that the items set forth in the Bill of Particulars were proven was the stipulation that Deputy Sheriff Carl Seltzer would testify that pieces of paper in the brown paper bag and under the cushion of the couch contained notations of purported bets on horse races and figures showing the totalization of wins and losses on the said purported bets. [Tr. of Rec., pp. 44-45.]

The mere fact that a witness would testify that in his opinion pieces of paper contained notations of purported bets does not show that there was an actual acceptance of the particular wagers set forth in the Bill of Particulars.

It is significant that the Government in its Brief did not answer the contentions of petitioner set forth in the Petition for Writ of Certiorari on page 15 to the effect that the Circuit Court in its Opinion erroneously concluded that there was a great mass of evidence of repeated transactions of appellant personally receiving from one or more persons at the North Burris apartment in Compton and that eyewitnesses saw him receive from runners or pick-up men sheets of paper of the kind used by bookmakers.

As pointed out in the Petition for Writ of Certiorari there is no evidence in the record that the petitioner received any transactions from anyone at the North Burris apartment. It was also pointed out in the Petition for Certiorari on page 15 that the record is silent that the persons who gave "rolled up packages of paper" were "runners or pick-up men". The record does not disclose an identification of the "rolled up packages of paper" handed to the petitioner at the auto park, insofar as the evidence introduced in the case in chief is concerned.

Conclusion.

For the reasons heretofore stated in the Petition for Writ of Certiorari and in this Reply Brief it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Dated: May 15, 1959.

Respectfully submitted,

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,
By MURRAY M. CHOTINER,
Attorneys for Petitioner.

MICROCARD
TRADE MARK ®
CD 97822
22
MATTHEW BENDER & COMPANY
MB
85-8
microcard